Supreme Court, U.S.
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No. 01-1623

In The

Supreme Court of the United States

IN RE: PHILIP ALAN WISCHKAEMPER
AND GARY A. TAYLOR,

Petitioners.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

This supplemental brief is filed in response to the invited Brief for the United States as *Amicus Curiae* ("Gov.Br.").

DISCUSSION

1. For the reasons set forth in the petition and briefs in *In re: Taylor & Harris*, No. 01-1605, this Court should grant review and hold that 21 U.S.C. §848(q) requires the appointment of counsel in state clemency proceedings.

The central issue in this petition – whether 21 U.S.C. §848(q) affords a federal habeas corpus petitioner, who was sentenced to death by a state court, the right to appointed counsel in state clemency proceedings – is presented in *In re: Taylor & Harris*, No. 01-1605 (filed Apr. 25, 2002). The Solicitor General has filed its invited brief in that case, and the petitioners in *Taylor & Harris* are submitting a supplemental brief. For the reasons set out in more detail in the petition, supplemental brief, and the supporting brief of *amici curiae* in that case, this Court should grant review and hold that §848(q) provides the statutory right to counsel in state clemency proceedings for a state capital defendant who has already filed a federal habeas corpus petition. Review is necessary to resolve a clear split among the circuits. And the issue is critically important. Clemency is the failsafe in our criminal justice system; in certain circumstances, it alone can prevent a miscarriage of justice. Appointed clemency counsel is essential to meaningful clemency review.

2. The question of appointment of counsel for certain successor proceedings was raised in the district court, though the Court may consider granting, vacating and remanding in light of *Taylor & Harris*.

Petitioners Philip Wischkaemper and Gary Taylor, who were appointed for the federal habeas corpus litigation, developed evidence pointing to Odell Barnes' actual innocence. They included this evidence in Mr. Barnes' state clemency application and in successor state and federal petitions, and subsequently sought compensation for work that concurrently furthered the clemency and the successor litigation. *See* Petition for a Writ of Certiorari ("Pet.") 3-5 & n.1. Because of binding circuit authority, they did not claim compensation for work directed *solely* to the state successor litigation. Contrary to the government's suggestion (*see* Gov.Br. 8-9), the question whether §848(q) provides for counsel in state successor litigation was presented to the district court, as counsel requested compensation for concurrent clemency and successor efforts, and is properly before this Court. Nevertheless, petitioners agree that the Court need not reach the issue if it holds that clemency representation is compensable, as the petitioners should then receive relief. For that reason, it may be particularly appropriate to grant review in *Taylor & Harris* and then grant, vacate and remand for further proceedings in light of that case.

3. The procedural questions are properly before this Court and review should be granted.

The petitioners do some of the most challenging work that lawyers can do. At a time when federal courts have difficulty finding skilled death penalty practitioners

willing to accept capital appointments,[1] these lawyers were simply given the back of the hand. Under the guise of a "post-audit," which one would think is limited to correcting accounting or like errors,[2] the district court applied a new case from a different federal district (*Chambers v. Johnson*, 133 F.Supp. 2d 931 (E.D. Tex. 2001)) retroactively, and ordered petitioner Philip Wischkaemper to refund fees that had been paid to him in August 2000. *See* Pet. App. 5a-7a; United States Treasury Check No. 5697-72382568 (issued Aug. 15, 2000). The district court simply entered an order directing him to repay fees, without affording Mr. Wischkaemper notice or a hearing of any kind. By the same order, and also without notice or a hearing, the district court denied compensation to petitioner Gary Taylor. *See id.*

When the petitioners appealed, the Fifth Circuit summarily dismissed the appeal for lack of jurisdiction. *See* Pet. App. 3a. The petitioners filed their first rehearing petition[3] and pointed out that the appeal concerned an order for *repayment* of fees, as well as an order denying fees. *See* Pet. App. 32a. They asked that the appeal be reinstated and that they be permitted to file merits briefs.

---

[1] *See* Supplemental Appendix, *infra* at 1a-3a (reprinting a May 27, 1999 law firm recruitment letter from twelve federal judges in Texas); Hon. Helen Ginger Berrigan, *Louisiana Lawyers Step Up to the Plate*, Fifth Circuit Civil News (Jan. 2001) (describing recruitment efforts).

[2] The instruction sheet provided by the Fifth Circuit tells counsel that their claim is subject to post-audit, and therefore tells them to keep time, attendance and expense records for three years. *See* Gov.Br. 11. The sheet reasonably signals only that their payments may be reviewed for accounting, reporting or like errors. This is in keeping with the plain meaning of "audit," which is "a formal or official examination and verification of books of account (as for reporting on the financial condition of a business . . . or on the results of its operation for a given period)." WEBSTER'S THIRD INT'L DICTIONARY 143 (1993).

[3] It was styled a "Motion for Reconsideration," but was treated as a rehearing petition. *See* Pet. App. 1a, 31a.

See id. The circuit reinstated the appeal, but then – still without allowing merits briefs – summarily affirmed the district court on the basis of *Clark v. Johnson* (*In re: Taylor*), 278 F.3d 459 (5th Cir. 2002). *See* Pet. App. 2a. The petitioners filed a second rehearing petition arguing *inter alia* that the district court's summary decisionmaking deprived Mr. Wischkaemper of due process. *See* Petition for Rehearing En Banc, *Barnes v. Johnson*, No. 01-10576 (filed Jan. 18, 2002), 13-15. Rehearing was denied.

Rather than acknowledge this appalling treatment, the government argues that the *petitioners* somehow failed to present their claims properly. Although they were not afforded the most basic elements of due process – notice or a hearing – they are somehow faulted for not making an objection in the district court, perhaps during the hearing that never took place. *See* Gov.Br. 10. Although they were not permitted to file briefs in the court of appeals, despite their specific request, they somehow erred by not reminding the court of appeals that it should give litigants the chance to identify the issues on appeal before it dismisses a case. *See* Gov.Br. 13. The government is wrong for reasons set out in more detail, below; the procedural questions are properly before this Court. The United States' argument also brings to mind Justice Black's admonition in *Hormel v. Helvering*, 312 U.S. 552 (1941), a case cited by the government:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

Id. at 557.

a. The petitioners had strong claims, but were not afforded a meaningful opportunity to raise them in the district court.

Contrary to the government's urging, the petitioners were not required to seek reconsideration in the district court. *See* Gov.Br. 10. The meaningful time to be heard is before a decision is made, and the petitioners were under no obligation to try to change the opinion of a judge who had already made up his mind. The case cited by the government, *Conley v. Board of Trs. of Grenada County Hosp.*, 707 F.2d 175 (5th Cir. 1983), does not stand for the proposition that a motion for reconsideration is necessary to properly preserve the issue for appeal. In *Conley*, the district court *sua sponte* granted summary judgment. The court of appeals noted that the party could simply file a direct appeal from the adverse judgment. *See id.* at 178; *see also Wright v. Hanna Steel Corp.*, 270 F.3d 1336, 1342 (11th Cir. 2001) ("An appellant is not precluded from presenting an issue for review on appeal where 'it did not need to – indeed could not – raise a challenge to the [district court's] authority . . . until the [district court] had performed the challenged act.'" (citation omitted)); *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 361 (11th Cir. 1984) (the rule requiring legal issues to be presented to the trial court "may be relaxed where the appellant raises an objection to an order which he had no opportunity to raise at the district court level."); *cf. Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 86 n.9 (1980) (a federal claim may be adequately presented "even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation.")

Had Mr. Wischkaemper been permitted to be heard in the district court, there is much he could have said in addition to addressing the construction of §848(q). Mr. Wischkaemper could have challenged the power of the district court to reopen his case in April 2001, eight months after he was paid for his work. The Federal Rules

of Civil Procedure, which generally apply in habeas corpus cases (*see* Fed. R. Civ. P. 81(a)(2)), do not appear to authorize the district court's actions. *See* Fed. R. Civ P. 59(d) (allowing a court to order a new trial on its own initiative, but no later than 10 days after entry of the judgment, and the parties must be given notice and a chance to be heard); Fed. R. Civ. P. 60(a) (allowing a court to correct clerical mistakes and errors arising from oversight or omission). Applying a new decision retroactively is hardly a clerical mistake or an oversight or omission. In *Dura-Wood Treating Co. v. Century Forest Industries, Inc.*, 694 F.2d 112 (5th Cir. 1982), the district court appropriately corrected an attorneys' fees award under Rule 60(a) where "the court intended one thing but by merely clerical mistake or oversight did another." *Id.* at 114. The Fifth Circuit made clear that "[s]uch a mistake must not be one of judgment or even of misidentification, but merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature." *Id.* (citation omitted).

Citing *United States v. Ohio Power Co.*, 353 U.S. 98 (1957), the government appears to argue that courts may modify their judgments on their own initiative for any reason at any time. *See* Gov.Br. 11. But that is manifestly not the law. In *Ohio Power Co.*, this Court vacated its earlier order, noting only that "the interest rules of finality in litigation must yield where the interests of justice would make unfair the strict application of our rules." *Id.* at 99. The case does not give all courts carte blanche to revisit prior judgments, as was made clear more recently in *Calderon v. Thompson*, 523 U.S. 538, 558 (1998), where this Court ruled that the Ninth Circuit erred in exercising its inherent power to recall its own mandate. A district court might have the inherent power or the authority under Fed. R. Civ. P. 60(a) to correct an accounting or other clerical error in the calculation of attorneys' fees, but that is hardly the same as reopening a case to apply a new substantive decision. *See Thompson*, 523 U.S. at 557 (distinguishing the recall of mandate for a new en banc vote from "the recall of a mandate to correct mere clerical

errors in the judgment itself, similar to those described in Federal Rule of Criminal Procedure 36 or Federal Rule of Civil Procedure 60(a).").

Mr. Wischkaemper might also have argued against the retroactive application of *Chambers v. Johnson*, even if the district court were found to have the power to reopen his case or conduct a "post-audit." Mr. Wischkaemper was paid for the clemency representation on August 15, 2000. As of that date, his work for the court was over. *Chambers v. Johnson*, a decision from a sister district, was not issued until March 2001. "New legal principles, even when applied retroactively, do not apply to cases already closed." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995) (citation omitted). And even if the case was not considered closed, a court has discretion not to apply a new rule of law where a party has relied upon previous law and there are significant policy justifications for not applying the new decision retroactively. *See id.* at 759. Mr. Wischkaemper could have shown that the district courts in Texas had consistently compensated lawyers for similar work and that he relied upon this practice. *See* Appendix to Petition for a Writ of Certiorari, *In re: Taylor & Harris*, No. 01-1605 (filed Apr. 25, 2002), 30a-31a. Given the shortage of qualified counsel for capital defendants in Texas (*see* Supplemental Appendix, *infra*, 1a-3a), strong policy considerations favor not applying the decision retroactively. Attorneys would rightly be reluctant to take federal habeas corpus appointments when they are at risk of losing compensation due to a change in the law after they have already rendered legal services and received payment. Thus, there is much Mr. Wischkaemper could have said, had the courthouse doors been open to him.

b. The petitioners were not allowed to file briefs in the court of appeals.

The petitioners specifically asked the Fifth Circuit to permit them to file merits briefs. *See* Pet. App. 32a. It is difficult to fault them for failing to make arguments when

they were not allowed to submit briefs. On the question whether the court of appeals can dismiss an appeal without allowing argument, briefing or an opportunity to identify the issues, the government only says that the error was harmless because the petitioners could present their arguments in a rehearing petition and because this Court "not infrequently decides cases without full merits briefing." Gov.Br. 13-14. But rehearing is disfavored in the Fifth Circuit. *See* Pet. 28. Thus, a chance to seek rehearing is in no way comparable to the opportunity to present an argument before the judges make up their minds. And though this Court occasionally issues summary reversals, the parties have at least submitted briefs at the certiorari stage, where the claims are presumably identified and presented.

Further, the rule about reaching issues not raised or addressed in the lower courts is prudential, not jurisdictional. While "*[i]n the ordinary course*, we do not decide questions neither raised nor resolved below" (*Glover v. United States*, 531 U.S. 198, 205 (2001) (emphasis added; citation omitted)), "the rule is not inflexible." *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam). This Court has noted that "there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . . or where 'injustice might otherwise result.'" *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (citations and footnote omitted). One such example is *Pollard v. United States*, 352 U.S. 354, 359 (1957), where the petitioner was without counsel in the lower courts and while preparing his petition for a writ of certiorari. Another is *Youakim*, where this Court remanded to consider an additional claim to avoid reaching a constitutional question. *See Youakim*, 425 U.S. at 234-36. The reasons to consider the issues in the case at bench are even more compelling than these.

c. Review should be granted.

The procedural issues are appropriately before this Court, and review should be granted. This Court should make clear to the lower courts that parties must be afforded an opportunity to be heard before money judgments can be entered and before appeals are decided on the merits. The court of appeals' decision, in particular, may be part of a larger trend towards deciding matters without full briefing. The Fifth Circuit regularly issues opinions denying certificates of appealability in capital habeas corpus cases, which results in affirmances without full merits briefing.[4] Indeed, in *Miller-El v. Cockrell*, No. 01-7662, this Court is considering whether to reverse the denial of habeas corpus relief in a case where the Fifth Circuit refused even to issue a certificate of appealability.

Alternatively, the Fifth Circuit decision should be vacated and the case remanded so that counsel can first present their arguments to the courts below. Of course, should the Court reverse in *In re: Taylor & Harris*, No. 01-1605, further proceedings on these procedural points would be unnecessary.

[4] For example, the Fifth Circuit denied certificates of appealability in Odell Barnes' habeas corpus appeal as well as the appeals related to *In re: Taylor & Harris*. *See* Pet. App. 27a-28a; *Soria v. Johnson*, 207 F.3d 232 (5th Cir. 2000); *Clark v. Johnson*, 202 F.3d 760 (5th Cir. 2000).

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the petition should be granted, the decision below vacated, and the cause remanded for further proceedings.

Respectfully submitted,

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Berkeley, California
November 2002

* Francis Martin and Sarah Ray, law students at the University of California School of Law (Boalt Hall), assisted in preparing this brief.

SUPPLEMENTAL APPENDIX

[Law Firm Form Recruitment Letter]

[Court seal] United States District Court
Southern District of Texas

May 27, 1999

[Blank]

Re: American Bar Association's Capital Habeas Recruitment

Dear [Blank]:

We invite you to meet with representatives of the American Bar Association's Death Penalty Representation Project to discuss how the project works, how your firm can participate, and how the ABA can help you. The meeting will be:

Tuesday, June 22, at 4:30-5:30 p.m.
Judges' Conference Room
United States Court House, Room 10004.

The problem arises from the more than 450 people on death row in Texas and about 40 additions annually. While we do not know what you think of the death penalty as a matter of social policy, we do know that it implicates at least two things you care about:

- The Constitution requires that the condemned have a meaningful opportunity to question his conviction and sentence collaterally, so when you help with collateral reviews, you help the Constitution as a whole.
- This court cannot reach its other work until it addresses these claims; the clearer and better grounded the presentation, the more effectively the court can do justice in these cases and in yours,

At the meeting, the ABA representatives (Attachment 1) will explain the multiple sources of truly effective assistance that will be available to your firm, including access to attorneys experienced n Texas capital habeas cases, occasional training seminars, sample pleadings, and briefing books.

Please let us know by returning the response form (Attachment 3) whether you or one of your partners will attend.

A list of the more than 40 firms recruited by the project in the past 18 months is included (Attachment 2). Several of Houston's most respected law firms already participate by representing death row prisoners in state or federal proceedings. We hope your firm will volunteer to help ensure competent representation in capital cases serving the Constitution and courts in the best tradition of American lawyers.

We look forward to seeing your firm there.

Very truly yours,

_____/s/ _____	_____/s/ _____
Carolyn D. King	Lynn N. Hughes
United States Court of Appeals	United States District Judge
_____/s/ _____	_____/s/ _____
Jerry E. Smith	David Hittner
United States Court of Appeals	United States District Judge

_____/s/ _____
Harold R. DeMoss, Jr.
United States Court of Appeals

_____/s/ _____
Kenneth M. Hoyt
United States District Judge

_____/s/ _____
Simeon T. Lake, III
United States District Judge

_____/s/ _____
John D. Rainey
United States District Judge

_____/s/ _____
Ewing Werlein, Jr.
United States District Judge

_____/s/ _____
Lee H. Rosenthal
United States District Judge

_____/s/ _____
Vanessa Gilmore
United States District Judge

_____/s/ _____
Nancy F. Atlas
United States District Judge

[Enclosures omitted]